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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955

No. 362

A. PHILIP GOLDSMITH, ABRAHAM FEINBERG, BENJAMIN HINERFELD, F. STAFFORD CLEARY, J. A. C. MUELLER, T. H. MUELLER, J. J. MURPHY, WILLIAM B. TERRY, G. H. CARR and JULIUS KAYSER & Co., a New York corporation,

Cross-Petitioners,

—against—

DAVID L. SUBIN,

Respondent.

RESPONDENT'S BRIEF

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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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1. In their cross-petition defendants give the impression (pp. 2, 6, 8) that this is a case of an application for summary judgment based on affidavits which disposed of the contentions in the complaint and were entirely unanswered by plaintiff. Such, however, is far from the case. The motion for summary judgment was here incidental to plaintiff's motion for an injunction based on his own affidavit and the affidavits primarily relied on by defendants were submitted in opposition to the injunction motion.

Plaintiff's affidavit amplified the complaint in at least one important respect. For he pointed out (Reply App. p. 2) that the machinery to be acquired manufactured only "full fashioned" hosiery which was a glut on the market, whereas "seamless" hosiery which is in great demand had

to be purchased from outside sources. If that is so, grave doubt is cast on the claim of defendants that the acquisition of Diamond's machinery would benefit Kayser. That issue alone would have to await a trial.

The only affidavit by any person having knowledge of the facts, defendant Feinberg, made no attempt to deal with all the charges in the complaint, but was directed primarily at persuading the Court not to grant an injunction.

Thus the affidavits relied on by defendants did not contain a word refuting paragraph 14(b) of the complaint [Pltff.'s App. p. 8] (incorporated by reference into the fifth count [Pltff.'s App. p. 16]), which states that the acquisition of the Diamond property will benefit that company and the other controlling stockholders of Kayser (Hillcrest and Hamilton), as well as Goldsmith, Feinberg and Hinerfeld, by permitting Diamond to withdraw from the hosiery business, where it operated at a diminishing rate of profit under unfavorable leases (which leases Kayser will take over in the contracts).

Nor is there anything to refute the charge that the business of Diamond, which operated at a continually reduced ratio of profit, would not contribute to the profitable operations of Kayser. Nor is there anything to refute the charges that the trademarks to be obtained from Diamond would not be useful to Kayser for the reasons alleged in the complaint.

Significantly, the affidavits do not contain one word to refute the charges concerning the borrowing by defendants, their urgent need to complete the transaction for

personal and selfish motives, the secret substitution of directors, as well as the other matters charged in the complaint.

The motion for summary judgment should, therefore, have been denied because defendants' papers were insufficient. The judgment of the court below can be sustained on that ground without the necessity for considering any of the side issues.

2. The conflict alleged (pp. 6, 7) to exist with other Circuits is illusory. For, as we have shown, defendants' affidavits do not "completely controvert" the complaint and plaintiff has submitted an affidavit which, in part at least, supports his complaint.

Nor do the cases establish any conflict. Thus, *Brooks* v. *Utah Power & Light Co.*, 151 F. 2d 514 (cited p. 6) holds only that no fraud had been shown under the circumstances there disclosed, which bear no resemblance whatever to the case at bar. The same observation is true of most of the cases cited by defendants.* Particularly inapt is the citation of *Wise* v. *Universal Corp.*, 93 F. Supp. 393, for there, at page 398, the court noted plaintiff's failure, despite a lapse of twenty months, to have taken the depositions of defendants to show that the statements made by them were not correct. For in the case at bar plaintiff never had such an opportunity, the motion for summary judgment having been made 12 days after the service of the complaint and 2 days after the filing of the amended complaint (See Pet. App., pp. 1, 2). The *Lindsey* case

* Indeed, some merely hold the complaint insufficient on its face: *Bresinger* v. *Margaret Ann Super Markets*, 192 F. 2d 458; *Sabin* v. *Home Owners' Loan Corp.*, 151 F. 2d 541.

(149 F. 2d 899) involved an attack on a conviction; defendants proved their case by court records.

3. Likewise there is no basis for the suggestion that there is any conflict within the Second Circuit itself. One would suppose that the decisions to which defendants call attention (p. 12) were rendered by two different sets of judges. But that is not the case. Judges Learned Hand, Swan, Chase and Frank all concurred in both sets of cases. One can but conclude that those judges believed that the facts of the particular cases called for differing results. There is, therefore, no such "intolerable and confused state of limbo" as is stated by defendants.

We respectfully suggest, therefore, that the cross-petition be denied.

Respectfully submitted,

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